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**Supreme Court of the United States**

**OCTOBER TERM, 1941**

**No. 604**

**MARK GRAVES, JOHN P. HENNESSEY AND JOSEPH M. MESNIG, AS COMMISSIONERS, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,**

**vs.**

**CARL J. SCHMIDLAPP AND ELIZABETH E. GORRIE, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EUGENE V. R. THAYER, DECEASED**

**ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK**

**PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1941.**

**CERTIORARI GRANTED OCTOBER 27, 1941.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 604

MARK GRAVES, JOHN P. HENNESSEY AND JOSEPH M. MESNIG, AS COMMISSIONERS, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

vs.

CARL J. SCHMIDLAPP AND ELIZABETH E. GORRIE, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EUGENE V. R. THAYER, DECEASED

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

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[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE  
DIVISION—FIRST DEPARTMENT**

**In the Matter of The Appraisal Under the Estate Tax Law  
of the Estate of EUGENE V. R. THAYER, Deceased**

**STATE TAX COMMISSION, Appellant,**

**CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors,  
Respondents**

**STATEMENT UNDER RULE 234, CIVIL PRACTICE ACT**

This is an appeal by the State Tax Commission from the order made and entered herein in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York on the 17th day of October, 1939, which order affirmed an order theretofore made and entered herein on the 1st day of December, 1938, fixing and assessing an estate tax in the estate of the decedent herein under Article 10-C of the Tax Law.

The State Tax Commission's notice of appeal was served on the attorney for the executors on the 14th day of November, 1939.

Elizabeth E. Gorrie and Carl J. Schmidlapp, qualified as [fol. 2] executors on the 16th day of January, 1937 and are still acting as such and are the respondents herein, and Willard A. Mitchell, Esq. has been their attorney throughout the proceedings and still is their attorney. The State Tax Commission is represented by Jerome M. Hirsch, Esq. There has been no change of parties since the commencement of the said proceedings.

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**IN SURROGATE'S COURT—NEW YORK COUNTY**

**P-121-1937**

**In the Matter of The Appraisal under the Estate Tax Law  
of the Estate of EUGENE V. R. THAYER, Deceased**

**NOTICE OF APPEAL TO THE APPELLATE DIVISION**

**SIRS:**

Please Take Notice that the State Tax Commission of the State of New York hereby appeals to the Appellate Division



of the Supreme Court of the State of New York, for the First Department, from the order made and entered in the above entitled proceeding, in the Office of the Clerk of the Surrogate's Court of the County of New York, on the 17th day of October, 1939, which order affirmed an order theretofore made and entered herein on the 1st day of December, [fol. 3] 1938, fixing and assessing an Estate Tax in the estate of the decedent herein, under Article 10-C of the Tax Law; and said appellant hereby appeals from each and every part of said order of October 17th, 1939.

Dated: New York, N. Y., November 13th, 1939.

Yours, etc., Jerome M. Hirsch, Attorney for State  
Tax Commission, Office and P. O. Address, 80 Centre Street, New York, N. Y.

To Willard A. Mitchell, Attorney for Executors, Office and P. O. Address, 141 Broadway, New York, N. Y.

[fol. 4] IN SURROGATE'S COURT FOR NEW YORK COUNTY

Present: Hon. James A. Foley, Surrogate.

Order Dismissing Appeal From Order Assessing Estate Tax. P-121-1937

In the Matter of The Appraisal under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased

ORDER APPEALED FROM—October 17, 1939

An order having been made on the 1st day of December, 1938, upon the report of Jacob Manicoff, Esq., Appraiser, assessing, fixing and determining the amount of the Estate Tax to which the estate of said Eugene V. R. Thayer, deceased, is liable, at the some of \$188,109.92;

And on or about the 17th day of January, 1939, the State Tax Commission having duly appealed to this Court from the order made as aforesaid, upon the following grounds:

(1) That the said order which assessed the tax against the above estate is erroneous, by reason of the fact that the report of the Appraiser, upon which said order is based, failed to include in the decedent's gross estate the value [fol. 5] of property passing under the exercise by the deced-

ent of a power of appointment, referred to in Schedule F of the executor's return.

(2) That the value of property passing under the exercise by the decedent of a power of appointment referred to in Schedule F of the executor's return is properly includible in the gross estate of this decedent for the purpose of the estate tax imposed by Article 10-C of the Tax Law of the State of New York.

And the said appeal having been duly brought before this Court for determination on, or about the 27th day of June, 1939;

And Jerome M. Hirsch, Esq., having appeared for the said Appellant, the State Tax Commission, and Willard A. Mitchell, Esq., having appeared for the Respondents, Elizabeth E. Gorrie and Carl J. Schmidlapp as Executors of the Last Will and Testament of the above-named decedent;

And the Court having considered the said report of the Appraiser, Jacob Manicoff, Esq., and the records and evidence upon which the said report was based, and counsel for the Appellant and for the Respondents having been heard and due deliberation having been had,

Now, on motion of Willard A. Mitchell, Esq., attorney for the said Executors, it is

Ordered and Decreed that the said appeal be and the same hereby is denied, and it is further

[fol. 6] Ordered and Decreed that the order made herein as aforesaid on the 1st day of December, 1938, assessing, fixing and determining the amount of the said Estate Tax at \$188,108.92, be and the same hereby is in all things confirmed.

J. A. F., Surrogate.

#### IN SURROGATE'S COURT—NEW YORK COUNTY

In the Matter of The Appraisal under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased

#### NOTICE OF APPEAL TO SURROGATE

SIRS:

Please Take Notice that the State Tax Commission hereby appeals to the Surrogate of New York County from the

order and determination of said Surrogate, entered herein on the 1st day of December, 1938, upon the following grounds:

(1) That the said order which assessed the tax against the above estate is erroneous, by reason of the fact that the report of the Appraiser, upon which said order is based, failed to include in the decedent's gross estate, the value of [fol. 7] property passing under the exercise by the decedent of a power of appointment, referred to in Schedule F of the executor's return.

(2) That the value of property passing under the exercise by the decedent of power of appointment referred to in Schedule F of the executor's return is properly includible in the gross estate of this decedent for the purpose of the estate tax imposed by Article 10-C of the Tax Law of the State of New York.

Dated, New York, N. Y., January 17, 1939.

Jerome M. Hirsch, Attorney for State Tax Commission, Office and Post Office Address, 80 Centre Street, New York, N. Y.

To: Willard A. Mitchell, Esq., Attorney for Executor, 141 Broadway, New York, N. Y.; George Loesch, Esq., Clerk of Surrogate's Court, New York, N. Y.

[fol. 8] IN SURROGATE'S COURT FOR NEW YORK COUNTY

Present: Hon. James A. Delehanty, Surrogate

P. 121-1937. Order Assessing Tax

In the Matter of the Appraisal of the Estate of EUGENE  
V. R. THAYER, Deceased

PRO FORMA ORDER—December 1, 1938

On reading the report filed the 30th day of November, 1938, of Jacob Manicoff, Esq., the appraiser appointed by order of this Court, dated the 3rd day of March, 1938, and it appearing that the said decedent died on the 1st day of January, 1937, it is

Ordered and Adjudged that the market value of the gross estate of said decedent at the time of death, the amount of

exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable, shall be and the same hereby is assessed, fixed and determined as follows:

Gross estate	\$3,100,264.97
Total deductions allowed by statute	\$ 458,365.66
Net estate	\$2,641,899.31
[fol. 9] Tax on net estate not in excess of \$150,000 less \$100,000 exemptions allowed under Section 249-q	\$ 500.00
Tax on net estate in excess of \$150,000	\$ 187,608.92
Total Tax	\$ 188,108.92

James A. Delehanty, Surrogate.

IN SURROGATE'S COURT, COUNTY OF NEW YORK

js:ks.

In the Matter of the Appraisal, Under the Estate Tax Law  
of the Estate of EUGENE V. R. THAYER, Deceased

REPORT OF APPRAISER

To the Surrogate's Court of the County of New York:

I, Jacob Manicoff, Estate Tax Appraiser, having been designated by Hon. James A. Delehanty, Surrogate of the County of New York, by an order duly made and entered on the 3rd day of March, 1938, to appraise the estate of the [fol. 10] above-named decedent, pursuant to the provisions of the Law imposing a tax on estates of residents and non-residents, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 249-v of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 21st day of November, 1938, at the Office of the Estate Tax Appraiser for the County of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same and having given due consideration to the affidavits and other papers submitted



herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First. I report that the decedent herein died a resident of the State of New York on the 1st day of January, 1937, leaving a Last Will and Testament, copy of which is hereto annexed, which was duly admitted to probate by this Court on the — day of —, 19—, and that thereafter on the 16th day of January, 1937, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to:

Elizabeth E. Gorrie, 1148 Fifth Avenue, New York City;  
Carl J. Schmidlapp, Mill Neck, Nassau Co. L. I. N. Y., As  
Executors.

[fol. 11] Second. I further report the following appearances in this proceeding:

Jerome M. Hirsch, Esq., Attorney for State Tax Commission, 80 Centre Street, New York City.

Willard A. Mitchell, Esq., Attorney for Executors, 141 Broadway, New York City.

Third. I further report that I found the property comprising the gross estate of the decedent herein to consist of the items set forth in the annexed affidavit for appraisal, and that the fair market value of each of the said items at the date of decedent's death is the amount set down by me opposite such item in the column designated "Value as appraised in this proceeding," and that the sums properly to be allowed as deductions herein for the purpose of determining the net estate are the amounts set down by me after the several items claimed in the column designated "Allowed in this proceeding," as a result of which I find the said gross estate and deductions to be shown in the following summary:

**Assets:**

Schedule A—Real Estate	\$	00
Schedule B—Stocks and Bonds		1,196,391.87
Schedule C—Mortgages, Notes, Cash and Insurance		1,402,598.57
Schedule D-1—Jointly Owned Property		0
Schedule D-2—Other Miscellaneous Property		501,274.53



[fol. 12] Schedule E—Transfers	0
Schedule F—Powers of Appointment	0
Schedule G-1—Property Identified as Previously Taxed	0

Gross Estate	<u>\$3,100,264.97</u>
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*Subject to Deductions as follows:*

Schedule G-2—Property Identified as Previously Taxed	\$ 0
Schedule H—Funeral and Administration Expenses	179,106.42
Schedule I—Debts	274,259.24
Schedule J—Mortgages, Net Losses, and Support of Dependents	0
Schedule K—Charitable, Public, and Similar Gifts andquests	<u>5,000.00</u>

Total Deductions	<u>\$ 458,365.66</u>
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The Net Estate, I Appraise at	<u>\$2,641,899.31</u>
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Fourth. I further report that the decedent died a non-resident of this State and that the total valuation of real property situated and tangible personal property having an actual situs within this State is \$—— (This paragraph applies only if the decedent was in fact a nonresident as shown in paragraph 1.)

[fol. 13] Fifth. I further report the amount of exemptions allowed under § 249-q to be:

<i>Beneficiaries</i>	<i>Relationship</i>	<i>Amount of Exemption</i>
Frederic Henry Prince	Stepson	\$ 5,000.00
Elizabeth Harding Thayer	Widow	20,000.00
Insurance		<u>75,000.00</u>
Total Exemptions		<u>\$100,000.00</u>

Respectfully submitted, Jacob Manicoff, Appraiser.

Dated: New York, N. Y., Nov. 30, 1938.

## SCHEDULE F.

## Powers of Appointment.

1.	\$100,000.	St. Louis-San Francisco Railway Co. Consolidated 4½% Bonds, due 1978 (Certificate of Deposit) Interest in default. Listed NYSE. at 28¾....	\$ 28,875.00
2.	25,000.	Western Union Telegraph Company Thirty-Year 5% Bonds, due 1960. Interest payable March and September 1st. Listed NYSE. At 108... Interest accrued to date of death (N. Y. Corporation).....	27,000.00 416.66
3.	800 shs.	American Machine & Foundry Company Capital stock. No par value. Listed NYSE. At 23¾ (N. J. Corp.).....	19,000.00
[fol. 14]			
4.	1250 shs.	American Telephone & Telegraph Co. Capital Stock. Par value \$100. Listed NYSE. At 184¾, ex-div..... Dividend declared prior to death (N. Y. Corp.)..	231,093.75 2,812.50
5.	1260 shs.	Bankers & Shippers Insurance Co. Par value \$25. Unlisted. Inc. in New York. At 103.....	129,780.00
6.	3037 shs.	The Chase National Bank of the City of New York. Par value \$12.55. Unlisted. At 49...	148,813.00
7.	100 shs.	Chicago, Wilmington & Franklin Coal Co. Pfd. stock. Par value \$100. Unlisted. Inc. in Mass. at 80.....	8,000.00
8.	80 shs.	Collins & Aikman Co. Preferred stock. Par value \$100. Listed NYSE. Inc. in Delaware at 112¾.	9,020.00
9.	200 shs.	Container Corporation of America Par value 20. Listed NYSE. At 21.....	4,200.00
10.	1323 shs.	Copper Range Co. Capital Stock. No par value. Listed NY Curb Exch. At 12¾.	16,537.50
11.	500 shs.	Creole Petroleum Co. Par value \$5. Listed NY Curb Exch. at 37½.	18,750.00
12.	425 shs.	Horders, Inc. stock. No par value. Listed NY Curb Exch. At 13¾.	5,737.50
13.	14 shs.	Inter-State National Bank (Kansas City) Par value \$100. Unlisted. Missouri corp. at 320. Dividend declared prior to death.....	4,480.00 112.00
14.	658 shs.	Kansas City Stock Yards Co. Com. stock. Par value \$100. Unlisted. Inc. in Maine. At 77¾.	50,995.00
15.	100 shs.	Liggett & Myers Tobacco Co. Class "B" stock. Par value \$25. Listed NYSE. Inc. in New Jersey. At 108¾.....	10,825.00
[fol. 15]			
16.	100 shs.	Louisville & Nashville R. R. stock. Par value \$100. Listed NYSE. At 90¾.	9,050.00
17.	800 shs.	Massachusetts Bonding & Insurance Co. Par value \$12.50. Unlisted. Inc. in Mass. At 63¾.	50,800.00
18.	50 shs.	Massachusetts Hospital Life Insurance Co. stock. Par value \$100. Unlisted. Inc. in Mass. At 93¾.	4,675.00
19.	500 shs.	Mathieson Alkali Works, Inc. stock. No par value. Listed NYSE. Inc. in Virginia. At 40¾.	20,250.00
20.	134 shs.	Midland Warehouse & Transfer Co. stock. Par value \$100. Unlisted. Inc. in Illinois. At 50.	6,700.00
21.	65 shs.	New England Trust Co. (Boston) Par value \$100. Unlisted. Inc. in Mass. At 400..... Dividend declared prior to death.....	26,000.00 975.00
22.	200 shs.	New Jersey Insurance Co. Par value \$20. Unlisted. Inc. in New Jersey. At 46½.	9,300.00

23.	1033 shs.	New Mexico & Arizona Land Co. stock. Par value \$1.00. Listed N. Y. Curb Exch. At 4.	4,132.00
24.	500 shs.	Northern Pacific Ry. Co. stock. Par value \$100. Listed NYSE. At 27 3/4. Inc. in Wisconsin.	13,875.00
25.	27 shs.	Pere Marquette Railway Co. Prior Preference stock. Par value \$100. Listed NYSE. At 87.	2,349.00
26.	753 shs.	Pere Marquette Railway Co. Pfd. stock. Par value \$100. Listed NYSE. At 90.	67,770.00
27.	100 shs.	Philadelphia Co. 6% Cum. Pfd. stock. Par value \$50. Listed NYSE. at 53.	5,300.00
28.	500 shs.	Seaboard Fire & Marine Insurance Co. stock. Par value \$5.00. Unlisted. Inc. in New York. At 13.	6,500.00
[fol. 16]			
29.	100 shs.	Standard Oil Co. of N. J. stock. Par value \$25. Listed NYSE. Inc. in New Jersey. At 68 3/4.	6,875.00
30.	42 shs.	Texas Land Syndicate. \$3. Par value none. Unlisted. Unincorporated. At 1 1/4.	5.25
31.	14 shs.	Texas Land Syndicate. No par value. Unlisted. At 1 1/4.	1.75
32.	200 shs.	United Carr Fastener Corporation stock. No par value. Listed NYSE. At 29 1/4.	8,850.00
33.	200 shs.	United Fruit Company Capital stock. No par value. Listed NYSE. Inc. in New Jersey. At 83.	16,600.00
		Dividend declared prior to death.	150.00
34.	300 shs.	United States Cold Storage Co. Common stock. No par value. Inc. in Delaware. At 5 1/4.	1,725.00
35.	36 shs.	Washington, D. C. Investment Trust. Unlisted. At 75 1/2.	27.00
36.	100 shs.	William Wrigley, Jr. Company stock. No par value. Listed NYSE. Inc. in Delaware. at 71 1/4.	7,125.00
		Dividend thereon declared prior to death.	100.00
37.	36 shs.	Worcester Building Trust. Worcester, Mass. Unlisted. At 25 1/2.	9.00
38.	1000 shs.	Wright-Hargreaves Mines, Ltd. No par value. Listed NY Club Exchange. At 7 1/4.	7,625.00
		Dividends declared prior to death. \$250.00	
		Less Canadian Tax 5% 12.50	
			237.50
39.	\$25,000.	Loan to Elizabeth E. Gorrie with interest at 5%.	26,000.00
		Accrued interest from 11/1/36 to 1/1/37.	220.28
[fol. 17]			
40.		Nathaniel Thayer Estate, Partial Distribution Certificate (60 parts) represents undivided interest in Chicago Real Estate. At.	14,964.00
41.	120 shs.	Drovers National Bank, Kansas City, Mo. in liquidation. At 2.	240.00
42.		Merchants National Bank, 23 State Street, Boston, Mass. Checking account \$126,990.76 Less amt. due Estate of Eugene V. R. Thayer.	
		Unpaid income collected to Dec. 31, 1936. \$13,003.39	
		Unpaid commission as trustee to Dec. 31, 1936.	
		854.89	13,888.28
			113,102.48
43.		1/18th interest in final payment in liquidation on 20 shares of Missouri Land Association.	27.40
44.		Refund of insurance premium re Maine camp.	41.12

## Securities Believed to be Worthless

1.	1200 shs. City Central Corporation.....	-0-
2.	3 shs. City Real Estate Trust, Chicago, Ill.....	-0-
3.	Eastern Kentucky Railway Sundries.....	-0-
4.	12 shs. Naumkeag Copper Co.....	-0-
5.	128 shs. Pacific Copper Company.....	-0-
6.	10 shs. Runaway Brook Golf Club.....	-0-
7.	184-40/50 shs. Stock Yards Investment Company.....	-0-
8.	11 shs. Winthrop Building.....	-0-
Total Schedule F.....		\$1,148,049.69
Deduct as per Schedule F (a).....		81,741.70
Net—Schedule F.....		<u>\$1,066,307.99</u>

[fol. 18]

## Schedule F (a)

Eugene V. R. Thayer, Sr., father of said Eugene V. R. Thayer, died on December 20, 1907. By his last will and testament, probated in Worcester County, Massachusetts, on January 14, 1908, he created a trust fund, the beneficiaries of which, after the death of his wife, were his three children, of whom said Eugene V. R. Thayer was one. Said Eugene V. R. Thayer was also one of the Trustees.

On July 8th, 1911, with the approval of the other Trustees and of the adult beneficiaries and in accordance with his understanding of the somewhat ambiguous provisions of his father's will, but without authorization by the Court, said Eugene V. R. Thayer segregated his one-third share of the trust fund and thereafter managed it as a separate trust, with the result that at the time of his death the value of his share of the trust fund substantially exceeded one-third of the value of the entire fund if combined.

After the death of Eugene V. R. Thayer, an account was filed with the Worcester County Probate Court by the Trustees under the Will of Eugene V. R. Thayer, Sr., and upon that accounting it was contended on behalf of other parties in interest that the segregation above mentioned was illegal, and that Eugene V. R. Thayer's share of the fund was in reality one-third of the total, and not the one-third which he had in his possession at the time of his death. The matter having been set down for a hearing in the Probate Court, [fol. 19] a discussion was had between the various parties in interest and a compromise was agreed upon substantially upon the basis of an equal division of the amount in dispute.

By the Will of Eugene V. R. Thayer he executed the power of appointment given him by his father's Will, and directed



that his share of the trust fund be paid over to his wife Elizabeth Harding Thayer,

Under the above settlement agreement, there was to be deducted out of the share of the trust fund theretofore administered by said Eugene V. R. Thayer the sum of \$75,023.75, which was one-half the amount in dispute, and which was to be paid over to the Trustees under the Will of Mr. Thayer's father for the benefit of the other beneficiaries. This agreement was submitted on petition to the Worcester County Probate Court and was approved by said court on the first day of February, 1938, and it was decreed by said court that the trust should be administered in accordance with said settlement agreement. The decree also fixed the amount of the fees and expenses of counsel and of the guardian *ad litem*, and directed that a pro rata amount of the same should be paid out of the share of the trust estate held at the time of his death by said Eugene V. R. Thayer.

The pro rata share payable out of said Eugene V. R. Thayer's share of the trust fund as fixed by said decree was \$5,143.35.

[fol. 20] There should also be deducted in computing the value of the appointive property the following disbursements incurred by or on behalf of the Trustees and chargeable against the appointive estate:

Transfer tax stamps on securities transferred to Mrs. Thayer .....	\$513.25
Register of Probate, Worcester, Mass.—Filing fee ..	84.00
Register of Wills, Allegheny Co., Penna. ....	3.00
Probate Court Jackson Co., Missouri .....	25.00
Langworthy, Spencer & Terrell, legal services Kansas City a/c sale of .14 shs. Inter-State National Bank stock .....	50.00
State Treasurer, State of Missouri—Waiver ..	.50
<b>Total .....</b>	<b>\$675.75</b>

It will also be necessary to deduct the cost of State and Federal tax stamps on the securities forming part of the trust fund and still to be delivered to Mrs. Thayer, which will amount to \$87.50. There should also be deducted from



the total shown by Schedule F the following additional items:

Mar. 5, 1937—Collector of Internal Revenue, New York, N. Y.—Payment in full of Income Tax for 1936 of Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer .....	\$ 134.91
Aug. 12, 1937—Collector of Internal Revenue, New York N. Y.—Additional tax assessed Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer [fol. 21] on income for 1935 .....	676.44
<b>Total</b> .....	<b>\$ 811.35</b>

The total amount to be deducted from the appointive property as shown by Schedule F is therefore as follows:

Amount as per settlement .....	\$75,023.75
Pro rata share of fees allowed by Court and required to be paid out of Eugene V. R. Thayer's share of trust .....	5,143.35
Prospective disbursement for tax stamps on transfer of remainder of trust fund to Mrs. Thayer .....	87.50
Other disbursements listed above .....	675.75
Payment made on 3/5/37 to Collector of Internal Revenue, New York, N. Y. in full of income tax for 1936 of Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer .....	134.91
Payment made on 8/12/37 to Collector of Internal Revenue, New York, N. Y. for additional tax assessed Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer on income for 1935 .....	676.44
<b>Total</b> .....	<b>\$81,741.70</b>

The assets constituting Mr. Thayer's share of the trust fund were in liquid form, and came into the possession of his executors.

[fol. 22] The settlement agreement above referred to ratified the previous delivery to Mrs. Thayer of certain items of the appointive estate, and provided that the executors should distribute the remainder of the appointive estate to Mrs. Thayer, as appointee of her husband's share, less the agreed deductions, and that the executors might treat

all assets held by them which constituted part of Mr. Thayer's share of the trust fund as if they had constituted assets of the estate of Mr. Thayer and that the executors might account to Mrs. Thayer for such assets, as a part of their account to her as residuary legatee. The executors have, therefore, with the written approval of Mrs. Thayer, who was a party to the settlement agreement, treated the appointive estate as in all respects part of decedent's estate, and it is so treated in this return.

IN SURROGATE'S COURT—COUNTY OF NEW YORK

In the Matter of The Appraisal Under the Estate Tax Law  
of the Estate of EUGENE V. R. THAYER, Deceased

AFFIDAVIT OF ELIZABETH E. GORRIE

STATE OF NEW YORK,

City and County of New York, ss:

ELIZABETH E. GORRIE, being duly sworn, deposes and says:

[fol. 23] I. I am one of the Executors of the above Estate.

II. A question having arisen concerning the taxable status of the appointive estate referred to in Schedule F (a) of the New York Estate Tax Return herein, verified March 8, 1938, the following facts are submitted for the information of the New York State Tax Commission, and it is respectfully requested that this affidavit be accepted and filed as supplemental to and as part of said Return:

In said Schedule F (a) the following statement was made:

"Said Eugene V. R. Thayer segregated his one-third share of the trust fund and thereafter managed it as a separate trust."

The statement above quoted was not intended to mean that Mr. Thayer became sole trustee of said one-third share. He continued to act as one of the three trustees for both trusts, namely, his one-third share of the trust created by his father's will, and the two-thirds share set apart for his sisters. As shown by said Schedule F (a) the division of the trust fund left by the will of decedent's father into

a one-third share and a two-thirds share was made in July, 1911. Mr. Thayer was then a resident of the State of Massachusetts and remained a resident of said State until 1918. In 1918 Mr. Thayer came to New York and remained in New York until 1929. For convenience, his share of the trust fund, viz., the share of which he received [fol. 24] the income, and with respect to which he had a power of appointment, was brought to this State at that time and was kept in a separate safe deposit box here during his residence in New York. It was in no sense commingled with his own funds but was at all times kept separate and distinct. He never acted or attempted to act as sole trustee of said one-third share but was at all times one of the three trustees having charge thereof. Two of the trustees of said trusts were at all times residents of the State of Massachusetts. In 1929, Mr. Thayer removed to Chicago, Illinois, and remained there as a resident of that State until 1934. At that time, for his convenience, the one-third share which had been set apart with respect to him was removed to Chicago and remained in that State for said five year period. In 1934 Mr. Thayer returned to New York and again brought the one-third share of the trust fund into this State.

The State of Massachusetts adopted an income tax law in 1916. At all times subsequent to the adoption of said law, the trustees of both of said trusts filed State income tax returns in Massachusetts with respect to said trusts, respectively, and paid taxes on all taxable capital gains shown thereby. Said returns showed that there were three trustees.

The annual accounts required by the Massachusetts law to be filed in the Probate Court of Worcester County, Massachusetts, were prepared with respect to both of said trusts from the time of the segregation, and all showed the names [fol. 25] of three trustees. Separate federal income tax returns were prepared and filed with respect to both of said trusts at all times subsequent to the adoption of the federal income tax act, and in each instance showed that there were three trustees.

Elizabeth E. Gorrie.

Sworn to before me this 20th day of September, 1938. Anthony F. Cassidy, Notary Public, New York County. Clerk's No. 248, Reg's. No. 00449. Commission expires March 30, 1940.

# LAST WILL AND TESTAMENT AND CODICIL OF DECEDENT-DONEE

I, Eugene V. R. Thayer, of Chicago, Cook County, Illinois, being of sound mind and memory, do hereby make, publish and declare this my Last Will and Testament hereby revoking all former Wills by me at any time made.

First. I direct that my just debts and funeral and testamentary expenses be paid out of my estate by my executors hereinafter named as soon after my death as may be convenient, together with all inheritance, legacy, succession, transfer or similar duties or taxes which may become payable with respect to any property or interest passing under this Will. I desire to be buried in the town of Lancaster, [fol. 26] Massachusetts, and I hereby authorize my executors to make provision out of my estate in such manner as they may deem proper for the care and maintenance of any cemetery plot in which I may be buried.

Second. I give and bequeath to my stepson Frederick Henry Prince, 3rd, in case he shall survive me, the sum of Ten Thousand Dollars (\$10,000).

Third. I give and bequeath to the Unitarian Church, of Lancaster, Massachusetts, the sum of Five thousand Dollars (\$5,000).

Fourth. I give and bequeath the sum of One hundred thousand dollars (\$100,000) to Elizabeth E. Gorrie, in consideration of many years of loyal and efficient service as my secretary.

Fifth. I give, devise and bequeath to my wife Elizabeth Harding Thayer, in case she shall survive me, for her own use absolutely, whether I shall or shall not leave issue me surviving, or issue born after my death, all the rest, residue and remainder of my property of whatsoever nature and kind the same may be and wheresoever situated, together with all reversion, remainders and other property, if any, over which I now have or at the time of my death may have any power of appointment or testamentary disposition.

Sixth. In case my said wife Elizabeth Harding Thayer [fol. 27] shall predecease me, I direct that all the rest, residue and remainder of my estate, including the reversion and remainders hereinbefore referred to and whether I



shall or shall not leave issue me surviving, or issue born after my death, be divided into three (3) equal shares.

Seventh. I give, devise and bequeath one of said three equal shares to my said stepson Frederick Henry Prince, 3rd, or in case he shall predecease me, then in equal shares to my sisters hereinafter named, the survivor to take all, excepting that the lawful issue of either such sister who may predecease me leaving lawful issue her surviving shall take in equal shares *per stirpes* and not *per capita* the share which such deceased sister would have taken under this clause, if living.

Eighth. I give, devise and bequeath another of said three equal shares to my sister Katherine T. Cate, wife of Curtis W. Cate, Esq., of Carpinteria, California, or in case she shall predecease me, to her son Henry Russell, or in case of his death, to my sister Susan T. Bigelow, now of Beverly Farms, Massachusetts, or in case of her death, to her son Eugene Thayer Bigelow.

Ninth. I give, devise and bequeath another of said three equal shares to my said sister Susan T. Bigelow, or in case she shall predecease me, to her son Eugene Thayer Bigelow, or in case both my said sister and her said son shall pre-[fol. 28] decease me, then to my said sister Katherine T. Cate, or in case of her death, to her said son Henry Russell.

Tenth. Whereas I may leave unfinished at my decease various matters of business, financial enterprises or undeveloped investments, and whereas any property in which my estate may at any time be invested may require for its preservation or development the investment of further sums:

Now, I authorize my executors whenever in their uncontrolled discretion it shall seem advisable to expend or pledge any portion or portions of my estate or to borrow such amount of money thereon or otherwise to do such other acts and things as in their judgment may be requisite to carry through and complete such unfinished matters of business, enterprises or investments, or for the preservation or development of any such property.

Eleventh. I further authorize my said executors in their discretion to vote, in person or by proxy, upon all stocks held by them; to unite with other owners of similar property in carrying out any plan for the reorganization of any



corporation or company whose securities form a portion of my estate; to exchange the securities of any corporation for others issued by the same or by any other corporation, upon such terms as said executors shall deem proper; to assent to the consolidation or merger of any corporation [fol. 29] whose securities are held by them with any other corporation, to the lease by such corporation of its property or any portion thereof, to any other corporation or to the lease by any other corporation of its property to such corporation, and upon such consolidation, merger, lease or similar arrangement to exchange the securities held by them for other securities issued in connection with such arrangement; to pay all such assessments, expenses and sums of money as they may deem expedient for the protection of their interests as holders of the stocks, bonds or other securities of any corporation or company, and, generally, to exercise in respect to all securities held by them all the same rights and powers as are or may be lawfully exercised by persons owning similar property in their own right.

Twelfth. I name, constitute and appoint as Executor and Executrix of this my Last Will and Testament Carl J. Schmidlapp, Esq., of Mill Neck, Nassau County, Long Island, New York, and Elizabeth E. Gorrie, of Chicago, Illinois. The word "Executor" as elsewhere used in this my Will shall include "Executrix". In case either of my said Executors shall predecease me, or shall be unable or unwilling to act as Executor hereunder, or shall die before my estate shall be fully administered, I name, designate and appoint as his or her substitute or successor as Executor hereunder, Willard A. Mitchell, of New York City. No executor or Executrix named in this Will shall be required [fol. 30] to give any bond or other security in this or any other State for the faithful performance of his or her duty as such or otherwise.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, in the Borough of Manhattan, City, County and State of New York, this 19th day of October, Nineteen hundred and thirty-two.

Eugene Y. R. Thayer (Seal.)

The foregoing instrument, consisting of four and three-fifths sheets of paper, was on the day of the date thereof,

signed, sealed, published and declared by Eugene V. R. Thayer, the Testator therein named, as and for his Last Will and Testament in the presense of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Willard A. Mitchell, 1040 Park Av., New York City;  
Anthony F. Cassidy, Albee Court, Larchmont, N. Y.;  
Gordon Peach, 1155 Dean St., Brooklyn, N. Y.

### Codicil of Decedent-Dónee

I, Eugene V. R. Thayer, of Chicago, Cook County, Illinois, having heretofore made and executed my Last Will [fol. 31] and Testament dated the Nineteenth day of October One thousand nine hundred and thirty-two, do hereby make, publish and declare this as and to be a Codicil thereto.

First. I hereby amend paragraph numbered "Eleventh" of my said Will by adding at the end thereof the following sentence:

"In any case in which my executors are required under the provisions of this Will to divide my estate or any portion thereof into parts or shares, or to distribute the same, or to make any cash payment, I authorize them in their discretion to make such division, payment or distribution in kind, or partly in kind and partly in money, and to that end to allot specific securities or other property, or any undivided interest therein, to any share or shares, or to any beneficiary, and for the purpose of such allotment the judgment of my executors concerning the propriety thereof and the value for the purpose of distribution or payment of the securities or other property, or interest therein, so allotted, shall be conclusive upon all persons interested in my estate, and for convenience I further direct that my said executors may if they see fit, in making any division or distribution hereunder, take the values of any or all items of property to be distributed, as of the date of my death."

Second. In all other respects, except as hereby amended, I do hereby ratify my said Last Will and Testament.

[fol. 32] In Witness Whereof, I have hereunto subscribed my name and affixed my seal, in the Borough of Manhattan, City, County and State of New York, this 24th day of April One thousand nine hundred and thirty-three.

Eugene V. R. Thayer. (Seal.)

The foregoing instrument, consisting of one and one-third sheets of paper, was on the day of the date thereof, signed, sealed, published and declared by Eugene V. R. Thayer, the Testator therein named, as and for a Codicil to his Last Will and Testament, in the presence of us, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Willard A. Mitchell, 1040 Park Av., New York City;

Anthony F. Cassidy, Albee Court, Larchmont, N.

Y.; Gordon Peach, 1155 Dean St., Brooklyn, N. Y.

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LAST WILL AND TESTAMENT AND CODICIL OF E. V. R. THAYER,  
SR.—DONOR

I, Eugene V. R. Thayer, of Lancaster, in the County of Worcester and Commonwealth of Massachusetts, make this my last Will and Testament.

[fol. 33]

Susan S. Thayer,  
furniture, etc.

*First.* After the payment of all my just debts I give to my wife, Susan S. Thayer, absolutely in fee, all my furniture, plate, fixtures, stationery, pictures, books and household stores, except those that fall within the provision of the second clause hereof.

Susan S. Thayer,  
for life, remainder  
to E. V. R.  
Thayer, estate at  
Lancaster and  
contents.

*Second.* I give to my said wife for her life, and upon her death to my son, Eugene V. R. Thayer; all my land and the buildings thereon, constituting my estate in said Lancaster, including in the same the contents of houses, stables and barns thereon, and all the personal property and live stock ordinarily used and enjoyed therewith. I also give to my said wife for her life my house on Raleigh Street in Boston, with the contents thereof.

Susan S. Thayer,  
for life, house on  
Raleigh Street  
and contents.

Susan S. Thayer,  
horses, carriages,  
articles of per-  
sonal use.

*Third.* I give to my said wife, absolutely in fee, all my horses, carriages, vehicles, harnesses, and all other articles appertaining thereto, or used therewith, excepting as may fall within the provisions of the second clause above written; also my clothing and all articles of personal use or adornment.

Residue of estate  
to trustees for  
following pur-  
poses:

*Fourth.* All the rest and residue of my estate of every description, including all the reversions and remainders and all property over which I may at the time of my death have any power of appointment or testamentary disposition, I give and devise to my trustees, but in trust nevertheless for the following purposes:

To pay debts, pe-  
cuniary legacies  
and legacy taxes.

(1) To pay all my debts and all the expenses of administration of my estate and to pay any



[fol. 34]

pecuniary legacies which may be given by this Will or by any Codicil or Codicils thereto, and to pay all legacy or inheritance taxes or succession duties payable under the laws of any State or Country, all of which should be paid out of my residuary estate and not by the legatees.

(2) During the life of my wife to pay all the taxes and assessments on said house and land on Raleigh Street, and also to pay all taxes and assessments on the estate at Lancaster and all expenses for keeping the buildings on said estate in repair and for keeping up the gardens and grounds and carrying on the farm, which taxes, assessments and expenses are not to be borne by my wife but are to be treated as a part of the expenses of the residuary estate.

During life of wife to pay taxes on Raleigh Street house, and taxes and expenses at Lancaster.

(3) To pay over from the net annual income of my estate to my said wife, Susan S. Thayer, in each and every year during her life, in equal quarterly payments, the sum of fifty thousand dollars (\$50,000.).

Susan S. Thayer, \$50,000 yearly.

(4) To pay to my son, Eugene V. R. Thayer, upon his coming into possession, at his mother's death, of my Lancaster estate, as hereinbefore provided, the sum of ten thousand dollars (\$10,000.) per year, so long as he shall own and keep the same, the above sum to be used in defraying expenses of keeping up the said estate.

E. V. R. Thayer, after his mother's death, \$10,000 per year.

(5) During the life of my wife to divide the remaining income quarterly between my children and the issue of my deceased children living at the time of each division, equally, by right of representation;

Divide remaining income between children and issue of deceased children.

E. V. R. Thayer, to have power of appointment.



[fol. 35]

Provided that if my son, Eugene V. R. Thayer, survives me, he shall have full power to appoint by will to whom his share of income with any accretions thereto shall be paid.

After setting apart funds for annuities, divide trust fund into shares for children and issue of deceased children.

E. V. R. Thayer, to have power of appointment.

(6) And after my trustees have set apart so much of the principal of the fund as will in their judgment always furnish sufficient income to pay any annuities given by this Will or any Codicil, to divide the trust fund into as many shares as there are children of mine then living, or deceased leaving issue then living; and to pay over the shares of deceased children to their issue, and continue to hold the shares of living children in trust as provided in Clause 7; Provided that if my son, Eugene V. R. Thayer survives me, he shall, whether he leaves issue or not, have full power to appoint by will to whom his share of the principal shall be paid, and in case he makes such appointment his appointees shall receive the same share which his issue, if any, would have received had he died intestate leaving issue.

Share of E. V. R. Thayer: income to him for life, on his death as he shall appoint.

(7) The shares held in trust for my son, Eugene V. R. Thayer, under the provisions of Clause 6, shall be held in trust to pay him the income quarterly during his life, and on his death to pay the principal as he shall by his will appoint, and in default of appointment, to his issue, and in default of issue living at his death, to my issue.

Shares of other children: income to them for life, principal to their issue.

The share held in trust for my other children shall be held in trust to pay the income to them quarterly during their lives, and on the death of

[fol. 36]

any child to pay the principal to its issue, or, in case it has no issue living at its death, to my issue.

Reversions to be added to trust, if wife living, otherwise divided among issue.

(8) If by the coming in of any reversions or legacy or by the death of any person or in any other way any sum shall be added to my estate, or if any part of my estate set apart under the provisions of Clause 6, or under any provisions of my Will or any Codicil, shall revert to the residue, I shall desire that if my wife is living such sum shall be added to the trust fund, but if she be dead I desire that it be divided among my issue, the share of any of my children to be added to its share of the trust fund.

Share of any child to be added to trust.

Issue means descendants by right of representation.

Wherever in this Will payments are directed to be made to the issue of any person I desire them to be made to the descendants of such person in any degree by right of representation.

Income for grandchild to be applied to maintenance during minority.

(9) Whenever by the provisions of the preceding clauses income becomes payable to any grandchild of mine such income shall during the minority of the grandchild be applied by my trustees for its suitable maintenance so far as necessary, and the balance capitalized for its separate benefit and the income and principal thereof disposed of precisely as is such grandchild's share of the income and principal of the general fund.

Balance to be capitalized for such grandchild.

Principal payable to grandchild to be held by trustees during minority.

Whenever by the preceding clauses any sum of principal is payable to any grandchild of mine such sum shall, if such grandchild is a minor, be held by my trustees during its minority and the income applied to its suitable maintenance so far

[fol. 37]

as necessary, and the balance capitalized and added to the principal which shall be paid to it on reaching twenty-one, or, if it dies after twenty-one then paid immediately on its death to its children, if any, and if it leaves no children, then to the descendants of its mother then living by right of representation, and if there are no descendants of its mother then living then to my descendants then living by right of representation.

To more remote descendants payments shall be made directly.

Whenever any sum, whether income or principal, is payable to a descendant of mine more remote than a grandchild, such sum shall be paid to it directly or to a guardian for its use.

No interest under this will assignable or liable to creditors.

No interest of any person under this will shall be assignable or liable to be attached or taken in any way by creditors.

Provisions for wife are in lieu of dower.

*Fifth.* The provisions hereinbefore made for my wife are in lieu of dower and of any and all claims to or upon my estate whether real or personal.

Responsibility as endorser or guarantor for brothers to continue for twenty years, but shall not be increased.

*Sixth.* In case I am at the time of my decease responsible as endorser or guarantor or in any way for any debt or obligation of my brothers, or either of them, I desire that such responsibility for each brother shall continue as a lien on my estate for twenty years after my death, if he lives so long, or if he dies within that time, for eighteen months after his death, and that neither of my brothers be required to relieve my estate from

[fol. 38]

such responsibility or to reduce the amount thereof during said respective periods, but such responsibility shall not be increased beyond the amount which shall be existing at my death.

Executors and trustees to carry out voluntary arrangements for the benefit of Mrs. Alice R. Thayer and various other persons, as to income.

*Seventh.* Whereas I have heretofore joined with my brothers and sisters in a certain voluntary arrangement by which, until notice from me to the contrary, the trustees under my father's will are to appropriate a portion of the income becoming due to me from time to time to and for the benefit of Mrs. Alice R. Thayer;

And whereas I have made other such arrangements for the payment of money by me or out of my share of the income of my father's estate to various persons and may hereafter make other similar arrangements;

Now, therefore, I desire that my executors and trustees shall respect and observe the said arrangements and so far as they legally may, and as it shall in their uncontrolled discretion prove to be necessary, shall cause them to be carried into full effect from and out of my estate.

*Eighth.* If at any time from any cause the number of trustees under this Will shall be less than three, then I direct the surviving or remaining trustee or trustees to fill the vacancy or vacancies by appointing a new trustee or trustees by proper instrument in writing and the trustee or trustees so appointed shall have all the powers given to my trustees by this Will and shall be exempt from giving security on their bond. Notwithstanding

Vacancies in number of trustees.



[fol. 39]

any vacancy the remaining or surviving trustee or trustees shall for the time being have all the powers vested in my trustees, but in case such vacancy shall not be filled by appointment, as hereinbefore provided, within ninety days after the same shall occur, a new trustee shall be appointed at the request of any party in interest by the Judge of the Probate Court wherein my estate shall be administered with like effect as if he were appointed by the surviving or remaining trustee or trustees.

Responsibility of trustees.

*Ninth.* My trustees shall be chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, and shall be accountable only for their own acts, receipts, neglects or defaults and not for those of each other, nor for any banker, broker or other person with whom trust moneys or securities may be deposited nor for the loss in value of any stock or securities unless the same shall happen through their own wilful default.

Legacies payable after three years; interest at 5 per cent shall run from death.

*Tenth.* My executors shall not be required to pay any legacies made by this Will nor any Codicil which I may make until the expiration of three years after my decease, but interest at five per cent. per annum shall run from my death on all legacies, the payment of which is not directed to be postponed.

Executors and trustees not to give surety; to have full power to sell real and personal property.

*Eleventh.* No executor or trustee under this Will shall be required to give any security or securities on his probate bond, and my executors

[fol. 40]

as well as my trustees shall have full power to sell my real or personal property at public or private sale without the aid of any court.

*Twelfth.* The majority of my executors and the majority of my trustees may exercise all the powers herein given to my executors and trustees respectively.

Majority of executors or trustees may exercise all powers.

In Testimony Whereof I hereunto set my hand and seal and in the presence of three witnesses declare this to be my last Will this fifth day of September, A. D. 1906.

EUGENE V. R. THAYER.

On this fifth day of September, A. D. 1906, Eugene V. R. Thayer, of Lancaster, Massachusetts, signed the foregoing in our presence, declaring it to be his last Will, and as witnesses thereof we three do now at his request, in his presence and in the presence of each other, hereto subscribe our names.

ALBERT E. JEWETT,

Clinton, Mass.

HELEN B. CARVILL,

Clinton, Mass.

CHARLES MAYBERRY,

Clinton, Mass.

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Codicil

I, Eugene V. R. Thayer, of Lancaster, in the County of Worcester and Commonwealth of

[fol. 41]

Massachusetts, do make this Codicil to my Will heretofore made and published by me and dated the 5th day of September, A. D. 1906, which Will I hereby ratify and confirm in all respects except as the same may be changed by this instrument.

Nathaniel  
Thayer, Eugene  
V. R. Thayer, and  
James E. Crone,  
executors and  
trustees.

*First.* I appoint my brother, Nathaniel Thayer, of Lancaster; my son, Eugene V. R. Thayer, of Lancaster; and James E. Crone, of Lexington, my executors and trustees, with all the powers, privileges and immunities given to my executors and trustees by my will.

Eugene V. R.  
Thayer \$100,000.

*Second.* I give to my son, Eugene V. R. Thayer, the sum of One Hundred Thousand Dollars (\$100,000.).

Susan Thayer  
\$100,000.

*Third.* I give to my daughter, Susan Thayer, the sum of One Hundred Thousand Dollars (\$100,000.), to be paid to her when she reaches the age of twenty-three (23) years.

\$100,000 in trust,  
to pay the income  
to Katharine  
Thayer Russell  
during life, on her  
death as she shall  
by will appoint,  
among her de-  
scendants or my  
descendants, and  
in default of ap-  
pointment to my  
descendants.  
Trustees may pay  
over principal.

*Fourth.* I give to my trustees hereinbefore named the sum of One Hundred Thousand Dollars (\$100,000.) in trust to pay the income thereof to my daughter, Katharine Thayer Russell, during her life, and on her death to such of her descendants, or to such of my descendants, in such amounts and on such trusts as she shall by Will, or by instrument in the nature of a Will, with or without the consent of her husband, direct and appoint, and in default of such appointment, to her descendants by right of representation, and if she has no descendants living at her death then to my descendants by right of representation. If my

[fol. 42]

trustees in their uncontrolled discretion think it best they may pay over from time to time, or at any time, any part or the whole of the principal of the trust fund hereby created to my said daughter, Katharine Thayer Russell. The interest of my daughter under the provisions of this article shall not be assignable or liable to be attached or taken in any way by her creditors.

Interest not assignable or liable to her creditors.

*Fifth.* I direct my trustees to pay annually during her life to Alice S. Blake, widow of James H. Blake, a sum sufficient to pay the rent of her house, not to exceed Sixteen Hundred Dollars (\$1600.) per annum; also a sum sufficient to pay the taxes thereon should she be required to pay them.

Alice S. Blake, rent of house not exceeding \$1600 per annum, and taxes.

*Sixth.* I give to my sister-in-law, Alice R. Thayer, the sum of Five Thousand Dollars (\$5,000.) token of my esteem and regard.

Alice R. Thayer, \$5,000.

*Seventh.* I give to my sister-in-law, Pauline R. Thayer, the sum of Five Thousand Dollars (\$5,000.) in token of my esteem and regard.

Pauline R. Thayer, \$5,000.

*Eighth.* I give to my sister-in-law, Evelyn R. Thayer, the sum of Five Thousand Dollars (\$5,000.) in token of my esteem and regard.

Evelyn R. Thayer, \$5,000.

*Ninth.* I give to my sister-in-law, Ruth S. Thayer, the sum of Five Thousand Dollars (\$5,000.) in token of my esteem and regard.

Ruth S. Thayer, \$5,000.

*Tenth.* I give to my nephew, N. Thayer Robb, of New York, the sum of Five Thousand Dollars (\$5,000.).

N. Thayer Robb, \$5,000.



[fol. 43]

James Parker  
\$5,000.

*Eleventh.* I give to my friend, James Parker, of Beverly, Massachusetts, the sum of Five Thousand Dollars (\$5,000.).

Robert C. Hooper,  
\$5,000.

*Twelfth.* I give to Robert C. Hooper, of Boston, the sum of Five Thousand Dollars (\$5,000.).

William A. Marston,  
\$5,000.

*Thirteenth.* I give to my cousin, William A. Marston, of Paris, France, the sum of Five Thousand Dollars (\$5,000.).

E. Rollins Morse,  
\$5,000.

*Fourteenth.* I give to E. Rollins Morse, of Boston, the sum of Five Thousand Dollars (\$5,000.).

H. R. Dalton, Jr.,  
\$5,000.

*Fifteenth.* I give to H. R. Dalton, Jr., of Boston, the sum of Five Thousand Dollars (\$5,000.).

Stephen V. R. Crosby,  
\$5,000.

*Sixteenth.* I give to my cousin, Stephen V. R. Crosby, of Boston, the sum of Five Thousand Dollars (\$5,000.).

Henry E. Russell,  
\$5,000.

*Seventeenth.* I give to Henry E. Russell, of Cambridge, the sum of Five Thousand Dollars (\$5,000.).

Henry S. Blake,  
\$5,000.

*Eighteenth.* I give to Henry S. Blake, of Boston, Massachusetts, the sum of Five Thousand Dollars (\$5,000.).

Oliver Ames,  
\$5,000.

*Nineteenth.* I give to Oliver Ames, of North Easton, the sum of Five Thousand Dollars (\$5,000.).

Horatio McKay,  
\$5,000.

*Twentieth.* I give to Horatio McKay, late of the Cunard service, the sum of Five Thousand Dollars (\$5,000.) as a token of my esteem and friendship for him.

[fol. 44]

*Twenty-first.* I give to Edward F. Ripley, the sum of Twenty-five Hundred Dollars (\$2500.).

Edward F. Ripley, \$2,500. (lapsed).

*Twenty-second.* I give to Allan G. Buttrick, of Lancaster, the sum of Three Thousand Dollars (\$3,000.).

Allan G. Buttrick, \$3,000.

*Twenty-third.* I give to Charles Starbuck the sum of Ten Thousand Dollars (\$10,000.) in token of my appreciation of his long and faithful services.

Charles Starbuck, \$10,000.

*Twenty-fourth.* I give to Betty Lofgren and Mary Williams the sum of One Thousand Dollars (\$1,000.) each if they are in my employ at the time of my death.

Betty Lofgren and Mary Williams, \$1,000 each.

*Twenty-fifth.* I give to Mrs. Anna N. Johnson, formerly Anna O. Nelson, the sum of One Thousand Dollars (\$1,000.).

Anna N. Johnson, \$1,000.

*Twenty-sixth.* I give to Lillian L. Orr the sum of Twenty-five Hundred Dollars (\$2,500.) in recognition of her faithful service to my wife.

Lillian L. Orr, \$2,500.

*Twenty-seventh.* I give to Helen G. Lufkin the sum of Five Hundred Dollars (\$500.) in recognition of her faithful service to my wife.

Helen G. Lufkin, \$500.

*Twenty-eighth.* I give to my friend, Dr. Walter P. Bowers, of Clinton, Massachusetts, the sum of Five Thousand Dollars (\$5,000.).

Walter P. Bowers, \$5,000.

*Twenty-ninth.* I give to T. Dennie Boardman, of Manchester, Massachusetts, the sum of Five Thousand Dollars (\$5,000.).

T. Dennie Boardman, \$5,000.

[fol. 45]

Henry D. Burnham, \$5,000.

*Thirtieth.* I give to Henry D. Burnham, of Stonington, Connecticut, but who resides in Boston, the sum of Five Thousand Dollars (\$5,000.).

Francis Peabody, Jr., \$5,000.

*Thirty-first.* I give to Francis Peabody, Jr., of Boston, the sum of Five Thousand Dollars (\$5,000.).

E. O. Orpet, \$2,000.

*Thirty-second.* I give to E. O. Orpet, provided he is in my employ at the time of my death, the sum of Two Thousand Dollars (\$2,000.).

Mrs. Arabel Haskell, \$500.

*Thirty-third.* I give to Mrs. Arabel Haskell the sum of Five Hundred Dollars (\$500.) in recognition of her faithful service to my wife.

Elizabeth B. Everett, \$1,000.

*Thirty-fourth.* I give to Elizabeth B. Everett the sum of One Thousand Dollars (\$1,000.).

Clayton C. Sweatt, \$1,000.

*Thirty-fifth.* I give to Clayton C. Sweatt, of Andover, Maine, the sum of One Thousand Dollars (\$1,000.).

Town of Lancaster, for perpetual care of burial lot, \$1,000.

*Thirty-sixth.* I give to the Town of Lancaster the sum of One Thousand Dollars (\$1,000.), the same to be accepted and used in the manner provided by law for the perpetual care of my burial lot in the cemetery in said town.

Town Hall at Lancaster if brothers determine.

*Thirty-seventh.* Whereas my brothers and myself have heretofore, voluntarily, contemplated and proposed to construct at our joint cost and expense a Town Hall in said Lancaster as a gift to said town, in memory of our father, Now, Therefore, if my said brothers, or any of them, shall at any time within five years after my de-

[fol. 46]

cease determine to consummate said purpose, and undertake such construction, and make such gift, and shall so notify my executors and trustees, my said trustees shall pay from the principal of their trust funds existing at the time of such payment one-fourth part of the total expense of the construction of such Town Hall.

*Thirty-eighth.* I give to my wife, Susan S. Thayer, the sum of Two Thousand Dollars (\$2,000.) to be distributed by her among the servants in my employ at my decease, except those who have been in my employ ten years or over, and to them I devise the sum of Five Hundred Dollars (\$500), each, except Charles Starbuck, E. O. Orpet, Anna N. Johnson, Mary Williams and Betty Lofgren, for whom I have made provision heretofore.

Susan S. Thayer  
\$2,000 for servants.

Servants employed ten years or over, \$500 each, except those specially provided for.

*Thirty-ninth.* I give to Joseph Whalen, now head barber at Young's Hotel, the sum of Five Hundred Dollars (\$500.).

Joseph Whalen,  
\$500.

*Fortieth.* I give to Raphael Tuccio, now barber at Young's Hotel, the sum of Two Hundred and Fifty Dollars (\$250.).

Raphael Tuccio,  
\$250.

*Forty-first.* I give to Fred C. French, if in my employ at the time of my death, the sum of One Thousand Dollars (\$1,000.).

Fred C. French,  
\$1,000.

*Forty-second.* I give to Walter F. Page, of Clinton, the sum of One Thousand Dollars (\$1,000.).

Walter F. Page,  
\$1,000.



[fol. 47]

Charles A. Bartlett, \$1,000.

*Fortythird.* I give to Charles A. Bartlett, of Lancaster, the sum of One Thousand Dollars (\$1,000.).

John Linton, \$1,000.

*Forty-fourth.* I give to John Linton, of Lancaster, the sum of One Thousand Dollars (\$1,000.).

F. H. Damon, \$1,000.

*Forty-fifth.* I give to F. H. Damon, of Melrose, the sum of One Thousand Dollars (\$1,000.).

Sara E. Barker, \$500.

*Forty-sixth.* I give to Miss Sara E. Barker, of Boston, the sum of Five Hundred Dollars (\$500.).

John Nuttall, \$500.

*Forty-seventh.* I give to John Nuttall, of Everett, the sum of Five Hundred Dollars (\$500.).

Mrs. Frank Nullett, \$200 a year during her life.

*Forty-eighth.* I give to Mrs. Frank Nullett, of Lancaster, the sum of Two Hundred Dollars (\$200.) a year during her life.

Body to be cremated.

*Forty-ninth.* I direct that my body be cremated and that my ashes be buried in my lot at Lancaster.

Legacies to be free of any duty taxes, or succession duty.

The legacies in the articles of this Codicil are to be free of any duty, taxes, or succession duty, and any such tax which may be legally due on said legacies whether under laws now in force or under laws hereafter enacted, shall be paid out of my general estate.

In Witness Whereof I hereunto set my hand and seal and in the presence of three witnesses declare this to be a Codicil to my last Will, this fourth day of April, A. D. 1907.

EUGENE V. R. THAYER. [SEAL]

[fol. 48] On this fourth day of April, A. D. 1907, Eugène V. R. Thayer, of Lancaster, Massachusetts, signed the foregoing instrument in our presence, declaring it to be a Codicil to his last Will, and as witnesses thereto we three do now at his request, in his presence and in the presence of each other, hereto subscribe our names.

James L. Putnam, 60 State St. [Seal.] J. M. Paula  
Wallner, 60 State St. Boston. [Seal.] W. L. Putnam, 60 State St. Boston. [Seal.]

IN SUPREME COURT OF NEW YORK

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

In the Matter of the Appraisal Under the Estate Tax Law  
of the Estate of EUGENE V. R. THAYER, Deceased

STATE TAX COMMISSION, Appellant,

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors, Respondents

STIPULATION AS TO CONCEDED FACTS

It Is Hereby Stipulated by and between the attorney for the Executors-Respondents and the attorney for the [fol. 49] State Tax Commission-Appellant, that the following facts are conceded for the purpose of the appeal herein, and that this stipulation be printed and made part of the record on appeal.

One: On July 8, 1911, one-third of the trust fund created by the Will of the decedent's father was segregated and thereafter was managed separately as a separate trust and said decedent herein received and retained for his own use during his life all of the income from the said one-third of the said trust fund, including the income upon the enhanced value of said one-third share.

Two: Annual accounts were separately filed with respect to the said one-third share of the said trust fund after the physical segregation thereof as aforestated in the Probate Court of Worcester County, Massachusetts. These annual accounts were rendered by all three Trustees, as Trustees of the said trust created under the Last Will and Testament of Eugene V. R. Thayer, Sr. A copy of one of the said annual accounts is annexed hereto and made a part hereof as though herein more fully incorporated. And

it is stipulated hereby that all other annual accounts similarly filed were in the same form and contained the same recitals.

Three: Fiduciary Income Tax Returns were made by the said three Trustees with respect to the said one-third share of the said trust separately from the Returns made [fol. 50] with respect to the remainder of the said trust.

Dated, New York, N. Y., March 13, 1940.

J. M. Hirsch, Attorney for State Tax Commission-  
Appellant. Willard A Mitchell, Attorney for Executors-Respondents.

### Duplicate

R. L., Chap. 150, §2

The First Account of Eugene V. R. Thayer, John E. Thayer and John E. Thayer, Jr., trustees under the will of Eugene V. R. Thayer late of Lancaster in the County of Worcester, Massachusetts deceased, for the benefit of Eugene V. R. Thayer.

This account is for the period beginning with the seventeenth day of October, A. D. 1917, and ending with the thirty-first day of December, A. D. 1917.

Said accountants charge themselves with the several accounts received, on account of principal, as stated in Schedule A, herewith exhibited,	\$860,019.76
and asks to be allowed for sundry payments and charges, on account of principal, as stated in Schedule B, herewith exhibited,	\$ 70,164.00

[fol. 51] Balance of principal invested as stated in Schedule C, herewith exhibited,	\$789,855.16
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They also charge themselves with the several amounts received on account of income, as stated in Schedule D, herewith exhibited,	\$ 17,681.68
and ask to be allowed for sundry payments and charges on account of income, as stated in Schedule E, herewith exhibited,	\$ 17,681.68

Balance of income,	\$ None
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John E. Thayer, Eugene V. R. Thayer, John E. Thayer, Jr., Trustees.

The undersigned, being all persons interested, having examined the foregoing account, request that the same may be allowed without further notice.

Eugene V. R. Thayer.

Boston January 30, 1918.

SUFFOLK, ss:

Then personally appeared the above-named accountants and made oath that the within account is just and true.

Before me, John C. Nuttall, Notary Public.

My Commission Expires May 7, 1920.

[fol. 52] COMMONWEALTH OF MASSACHUSETTS.  
Worcester, ss:

At a Probate Court held at Worcester, — in said County, on the — day of — A. D. 19—.

The foregoing account having been presented for allowance, and verified by the oath of the accountant, and all persons interested having been duly notified — having consented thereto in writing, and no objections being made thereto, and the same having been examined and considered by the Court.

It Is Decreed that said account be allowed.

— — —, Judge of Probate Court.

[R. L. Chap. 150, §2]

Schedule A

Dolls. Cts.

Amount of personal property, according to inventory, or

Balance of principal, according to next prior account;

Amounts received on account of principal, as follows:

*See attached sheet*

Schedule A

Balance of principal according to next prior a/c ..... 816,769.95



Amounts received on acct. of principal  
as follows:

[fol. 53]		GAIN ON SALES PERSONAL ESTATE	
Oct. 19	\$20,000. Kansas City, Ft. Scott & Memphis 4% Bonds	282.50	
	130 shares U. S. Steel Corp. Pfd. Stock	3,120.	
	92 " United Fruit Co. Stock	6,554.31	
	200 " Great Northern Paper Co. Stock	33,000.	
Nov. 15	For 34 shs. Submarine Signal Co. Stock, formerly considered of no value and now valued at	1.	
	For 500 Myopia Hunt Club 4% Bond, formerly considered of no value, and now valued at	1.	
26	Myopia Hunt Club 4% Bond sold	249.	
Dec. 21	a/c Distribution of Assets Texas Land Syndicate #3	42.	
Total Schedule A		860,019.76	

SCHEDULE B

Amounts paid out and charges on account of principal as follows:

LOSS ON SALE OF THE FOLLOWING SECURITIES

Oct. 19	\$18,000. Georgia Ry & Electric Co. 5% Bonds	900.	
	12,000. Kansas City, Memphis & Birmingham 4% Bonds	1,800.	
	10,000. Kansas City Stock Yds. Co. of Mo. 5% Bonds	500.	
	10,000. Union Elec. Light & Power Co. of St. Louis 5% Bonds	200.	
[fol. 54]	12,000. N. Y., N. H., & Hartford R. R. Co. 6% Bonds	1,200.	
	32,000. St. Louis-San Fran. Ry. Co. Adj. 6% Bonds	3,764.37	
	50,000. St. Louis-San Fran. Ry. Co. Prior Lien 5% Bonds	10,000.	
	33,500. Pere Marquette Ry. Co. 1st Mtg. 5% Bonds	3,802.16	

	100 shares Union Pacific R. R. Co. Common Stock	162.50
Nov. 23	458 shares N. Y., N. H., & Hartford R. R. Co. Stock	47,259.73
	25 shares Technology Chambers Trust Stock	575.50
	Undivided interest in Lot in Mt. Au- burn Cemetery, formerly carried in Schedule C. (Should not have been carried in personal property)	.34
o	Total Schedule B	70,164.60

### SCHEDULE C

Cash	85,624.86
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### BONDS

\$16,000.	Pere Marquette Ry. Co. 1st Mtg. Series B	4s	12,800.
3,000.	Ft. Street Union Depot Co. Notes	6%	2,700.
4,000.	Jacksonville Electric Co.	5s	3,600.
[fol. 55]			
23,500.	Kansas City, Memphis & Birming- ham Inc.	5s	20,445.
4,000.	Kansas City & Memphis Ry. & Bridge Co.	5s	3,800.
3,000.	Penn. & Maryland Steel Co.	6s	3,000.
2,000.	Tennis & Racquet Club	5s	1,800.
4,000.	Terre Haute Electric Co.	5s	3,600.
5,000.	United States Steel Corp.	5s	4,150.
3,000.	Houston & Texas Central R. R. Co.	5s	3,260.
4,000.	Sierra & San Francisco Power Co.	6s	3,000.
2,000.	Kansas City Railways Co. 1st Mtg.	5s	1,800.
2,000.	do Series B	5s	1,800.
10,000.	do 2nd Mtg.		
	Ser. A.	6s	9,200.
5,000.	Kansas City Light & Power Co. 2nd Mtg.	6s	4,600.
	Total Bonds		\$79,555.

### STOCKS

312 shs.	Bankers Realty Investment Trust Stock	30,890.
230 "	Hamilton Woolen Co.	21,850.
500 "	Union Mills, Inc. Com.	23,500.

500	"	Atlantic Coast Fisheries Co. 1st Pfd.	50,000.
50	"	Boston Morris Plan Co.	5,500.
50	"	Quissett Mill	8,750.
250	"	Bankers Realty Co. Pfd.	
75	"	do Com.	25,000.
200	"	Merchants National Bank	60,000.
60	"	Indian Head Mills of Alabama	1,500.
1323	"	St. Mary's Mineral Land Co.	56,960.06
25	"	Osceola Consolidated Mining Co.	2,000.
[fol. 56]			
64	"	Winona Copper Co.	832.
34	"	Michigan Iron & Land Co.	.34
14	"	Inter-State National Bank, Kansas City	4,550.
38	"	National Safe Deposit Co., Chicago	2,711.43
9	"	Second National Bank of Boston	1,845.
27	"	American Trust Co., Boston	8,690.
30	"	New England Trust Co.	10,500.
52	"	Old Colony Trust Co.	12,308.83
67	"	The Midland Warehouse & Transfer Co.	6,700.
10	"	New England Kennel Club Pfd.	1.
226	"	American Tel. & Tel. Co.	29,342.
200	"	International Nickel Co. Common	5,125.
820	"	St. Louis-San Francisco Ry. Common	37,575.74
50	"	Chicago Junc. Rys. & Union Stock Yds. Co. Com.	7,047.92
100	"	Atchison, Topeka & Santa Fe Ry. Com.	10,012.50
66	"	Illinois Traction Co.	6,600.
26	"	do Common	0
14	"	Texas Land Syndicate #3	0
42	"	Texas Land Syndicate	0
75	"	Mass. Bonding & Insurance Co.	15,400.
25	"	Gloucester Trust	2,500.
225	"	Chicago, Wilmington & Franklin Coal Co. Pfd.	18,000.
27	"	Van Rensselaer Land Co.	.34
557	"	Kansas City Stock Yds. Co. of Maine Pfd.	44,560.
79	"	Kansas City Stock Yds. Co. of Maine Com.	3,950.
1033	"	New Mexico & Arizona Land Co.	0
27	"	Pere Marquette Ry. Prior Preference Stock	2,613.10

[fol. 57]

189	"	Pere Marquette Ry. Comm.	2,613.10
753	"	do Pfd.	56,445.88
100	"	Chicago, Milwaukee & St. Paul Ry. Pfd.	14,215.63
100	"	W. A. Slater Mills, Inc., Common	10,000.
34	"	Submarine Signal Co.	1.
712	"	Eastern Kentucky Railway Co. Common	.33
128	"	Pacific Copper Co.	.34
12	"	Naumkeag Copper Co.	.34
2105	"	Eastern Ky. Ry. Co. Pfd. (1/3 undiv. int. in)	.33
1/12		Undivided interest in Eastern Ky. Ry. Co. Extension of Rd. a/c	.34
		Undivided interest in Eastern Ky. Ry. Co. Loan a/c	4,547.69
		Isabel J. Butler Loan a/c	900.02
		Suspense	12,411.44
Total Schedule C			789,855.16
" " B Brought forward			70,164.60
Total Schedules B and C			<u>\$860,019.76</u>

## Schedule D

Balance of Income according to next prior a/c 8,016.95

Amounts received on account of Income, as follows:

Oct. 17 Rec'd interest on notes of Eugene V. R. Thayer

[fol. 58]	\$25,000.	3 mos. 8 d. @ 4%	\$272.22	
	20,000.	2 " 17 d. @ 5%	213.89	
	34,000	1 mo. 5 d. @ 5%	165.27	651.38

19 Rec'd accrued interest 3m. 18d. on \$18,000. Georgia Railway & Electric Co. 5% Bonds Sold

270.



Rec'd accrued interest 1m. 18d. on \$12,000. Kansas City, Memphis & Birmingham 4% Bonds Sold	64.
Rec'd accrued interest 18d. on \$20,000. Kansas City, Ft. Scott & Memphis Railway 5% Bonds Sold	40.
Rec'd accrued int. 2m. 18d. on \$10,000. Kansas City Stock Yards Co. of Missouri 5% Bonds Sold	108.33
Rec'd accrued interest 1m. 18d. on \$5,000. American Telephone & Telegraph Co. Conv. 4½% Bonds Sold	30.
Rec'd accrued interest 1m. 18d. on \$10,000. Union Electric Light & Power Co., St. Louis 5% Bonds sold	66.67
Rec'd accrued interest 3m. 18d. on \$12,000. N. Y., N. H. & Hartford R. R. 6% Bonds Sold	216.
Rec'd accrued interest 3m. 18d. on \$50,000. St. Louis-San Francisco Ry. Prior Lien 5% Bonds Sold	750.
Rec'd accrued interest 3m. 18d. on \$33,500. Pere Marquette Railway Co. 1st Mtg. 5% Bonds Sold	502.50
Nov. 1 Rec'd coupons on the following bonds: \$5,000. United States Steel Corp. 5% Bonds	125.
[fol. 59] 4,000. Jacksonville Electric Co. 5% Bonds	100.
Rec'd the following dividends:	
225 shs. Chicago, Wilm. & Franklin Coal Co. Pfd.	337.50
27 " Pere Marquette R. R. Co. Prior Pref. Stock	33.75
25 " Osceola Consolidated Mining Co. Stock	50.
557 " Kansas City Stock Yds. Co. of Me. Pfd.	696.25
79 " Kansas City Stock Yds. Co. of Me. Com.	98.75
38 " National Safe Deposit & Trust Co.	57.
10 " New England Kennel Club Pfd.	20.
Interest on bank deposits	32.71

15	Rec'd the following dividends:	
	52 shs. Ond Colony Trust Co.	156.
	25 " Technology Chambers Trust	50.
	50 " Quisset Mill Common	600.
19	26 " Illinois Trac. Co. Common	19.50
22	Return of rent Box 141, Union Safe Deposit Vaults	8.33

Dec. 1	Rec'd the following dividends:	
	500 shs. Union Mills, Inc., Common Stock	500.
	60 " Indian Head Mills	180.
	100 " Atchison, Topeka & Santa Fe Common	150.
[fol. 60] 7	Rec'd of Trustees u/w N. Thayer, Sr. 1/18 of balance of income from Annuity Fund	328.67
	Rec'd of Merchants National Bank, int. on dep. Nov.	11.40
19	Rec'd of Trustees u/w N. Thayer, rents Chicago Estates	445.28
31	Rec'd interest on deposits Dec., Merchants Nat. Bank	24.88
	Balance in Tax Reserve Fund transferred to Income	2,940.43
	Refund of income tax withheld on coupon due Aug. 1st on \$500.	
	Myopia Hunt Club Bond	.40
	Total Schedule D	<u>\$ 17,681.68</u>

### Schedule E

Amounts paid out and charges on account of income as follows:

Nov. 1	Paid for stamps a/c transfer securities	84.72
30	" Rent of office, Nov. and Dec.	43.42
	" Miss S. E. Barker, clerical work	4.16
Dec. 10	" Lee, Higginson transfer tax on 100 Atchison, Topeka & Santa Fe Railway Com. Stock	2.00
	" Clayton C. Sweatt, wages December	50.

[fol. 61]

24	"	Rent camp site, Millbrook Lodge	33.34
	"	Insurance premium " "	83.51
	"	Allowances to William A. Marston and Alice R. Thayer	194.42
	"	Isabel J. Butler, 6 mos.	73.34
	"	Rent 49 Mass. Ave.	117.25
	"	Allowances to Helen B. Cram and Josephine S. Sprague	26.66
	"	Allowances to James E. Crone 3 mos.	250.00
	"	Trustees Commissions on income collected Oct. 17, 1917-Dec. 31, 1917, inclusive 5% on \$7,339.01	366.95
31	"	Eugene V. R. Thayer balance of income to date	16,351.90
Total Schedule E			<u>17,681.68</u>

## Schedule F

## Showing Changes in Investments

## Receipts

		Amount overinvested per previous ac- count	4,456.63
Oct. 17	Rec'd of Eugene V. R. Thayer payment of his notes:		
	Jan. 9, 1913	\$25,000.	
	July 30, 1913	20,000.	
	Mar. 12, 1915	34,000.	79,000.
[fol. 62]			
19	Rec'd from sale 130 shs. U. S. Steel Corp. Pfd. Stock		14,560.
	" " " 100 shs. Union Pacific R. R. Com. Stock		12,000.
	" " " 92 shs. United Fruit Co. Stock		11,132.
	" " " 200 shs. Great North- ern Paper Co.		60,000.
	" " " \$18,000 Ga. Ry. & Elec. Co. 5% Bonds		16,200.

	"	"	"	\$12,000 K. C., Mem. & Birm. 4% Bonds	8,400.
	"	"	"	\$20,000 K. C., Ft. Scott & Mem. 4% Bonds	14,000.
	"	"	"	\$10,000 K. C. Stock Yds. Co. of Mo. 5% Bonds	9,500.
	"	"	"	\$5,000 American Tel. & Tel. Co. Conv. 4½% Bonds	5,000.
	"	"	"	\$10,000 Union Elec. Light & Power Co. of St. Louis 5% Bonds	9,000.
	"	"	"	\$12,000 N. Y., N. H. & Hartford 6% Bonds	10,800.
	"	"	"	\$32,000 St. Louis-San Francisco Ry. Cumulative Adjust-ment 6% Bonds	19,200.
	"	"	"	\$50,000 St. Louis-San Francisco Ry. Prior Lien 5% Bonds	40,000.

[fol. 63]

Rec'd from sale \$33,500 Pere Mar-

				quette Ry. Co. 1st Mtg. 5% Bonds	26,800.
23	"	"	"	458 shs. N. Y., N. H. & Hartford R. R. Co.	11,538.47
	"	"	"	25 shs. Technology Chambers Trust	1,299.50
26	"	"	"	\$500 Myopia Hunt Club 4% Bond	250.
30	"	"	"	300 shs. Merchants National Bank	82,500.
Dec. 21	"	"	"	distribution assets of Texas Land Syndicate #3	42.

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426,765.34



## Payments

Oct. 17	Paid for 500 shs. Union Mills, Inc. Com-	
	mon Stock	23,500.
" "	500 shs. Atlantic Coast Fish-	
	eries Co. 1st Pfd. Stock	50,000.
" "	50 shs. Boston Morris Plan Co.	
	Stock	5,500.
19	" 250 shs. Bankers Realty In-	
	vestment Trust Stock	25,000.
" "	230 shs. Hamilton Woolen Co.	
	Stock	21,850.
" "	500 shs. Merchants National	
	Bank Stock	142,500.
" "	50 shs. Quissett Mill Stock	8,750.
[fol. 64]		
	Paid for 250 shs. Bankers' Realty Co.)	
	Pfd. Stock )	
	75 shs. Bankers' Realty Co.)	
	Com. Stock )	25,000.
24	" 62 shs. Bankers' Realty Invest-	
	ment Tr. Stock	5,890.
" "	225 shs. Chicago, Wilm. &	
	Franklin Coal Co. Pfd.	18,000.
" "	100 shs. W. A. Slater Mills,	
	Inc. Com. Stock	10,000.
" "	40/100 sh. Pere Marquette Ry.	
	Co. Prior Pref.	19.60
" "	12/100 sh. Pere Marquette Ry.	
	Co. Pfd. Stock	5.88
" "	200 shs. International Nickel	
	Co. Com. Stock	5,125.
	Cash (uninvested principal)	85,624.86
		<hr/>
		426,765.34

IN SURROGATE'S COURT FOR NEW YORK COUNTY.

## OPINION OF THE SURROGATE

(Decision in Law Journal, October 5, 1939. By Mr. Surrogate Foley)

Estate of Eugene V. R. Thayer—This is an appeal by the state tax commission from the order of December 1,

1938, fixing the estate tax on the appraiser's report. The ground of appeal is that the appraiser erroneously failed to [fol.65] include as part of the taxable estate the value of property passing under the exercise by the testator of a power of appointment. The power to appoint by will was given to the testator in the will of his father, who died a resident of the State of Massachusetts. The property subject to the power consists of intangibles in the residuary trust established in Massachusetts under the father's will. The decedent died a resident of this State.

The sole question presented by this appeal is whether the recent decisions of the United States Supreme Court in *Curry v. McCanless* (vol. 83, L. Ed., Advance Opinions, 865), and *Graves v. Elliott* (83 *id.* 880) have overruled the determination of the courts of our State in *Matter of Sandford* (277 N. Y. 323); *Matter of Canda* (197 App. Div. 597); and *Matter of Burch* (160 Misc. 342), which held that the exercise by a resident donee of a power of appointment, created by a non-resident donor, is not taxable in this state. I hold that these latter authorities have not been nullified.

The recent Supreme Court cases are readily distinguishable from the New York authorities. In *Curry v. McCanless* the donor and donee of the power of appointment were one and the same person. That fact was emphasized by the court throughout the prevailing opinion of Mr. Justice Stone. In such circumstances the court held the power of appointment "as equivalent to ownership of the property subject to the power" (Citing *Chanler v. Kelsey*, 205 U. S. [fol. 66] 466, 51 L. ed., 882, 27 S. Ct., 550; *Bullen v. Wisconsin*, 240 U. S. 630, 60 L. ed., 835, 36 S. Ct., 473; *Chase Nat. Bank v. United States*, 278 U. S. 327, 338, 73 L. ed., 405, 409, 49 S. Ct., 126, 63 A. L. R., 388). Here the donor and donee were different persons. Whether the power of appointment was exercised, as in the *McCanless* case, or the powers reserved to the donor relinquished or extinguished at her death, as in *Graves v. Elliott* (*supra*), such power of appointment, modification or revocation is a property right and an appropriate subject of taxation by the domiciliary state of the donor of the power. The property in the possession of a corporate trustee in another state is likewise subject to the taxing powers of that state (*Curry v. McCanless, supra*).

In the proceeding here the donor was a resident of the State of Massachusetts. The facts are identical with those presented in *Matter of Sandford (supra)*, in which the Court of Appeals held that neither the presence in this state of the certificates or instruments evidencing the intangible property, nor the removal of the residence of the trustee into this state afforded a basis for the imposition of a tax. The court based its opinion in great part on the decision of the United States Supreme Court in *Wachovia Bank & Trust Co. v. Doughton* (272 U. S. 567). There the donor of the power of appointment died a resident of Massachusetts. After his death his daughter, the donee moved to North Carolina. Her will whereby she exercised [fol. 67] the power was admitted to probate in the latter state. In denying North Carolina the right to tax the property passing under the power the United States Supreme Court said, at page 575: "We think the assets of the trust estate established by the will of Haynes had no situs, actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control (*Frick v. Pennsylvania*, 268 U. S. 473)."

In discussing this subject of jurisdiction in its recent decision in *Curry v. McCanless (supra)*, Mr. Justice Stone wrote: "Whether the appointee derives title from the donor under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee (Cf. *Wachovia Bank & T. Co. v. Doughton*, 272 U. S. 567, 71 L. ed., 413, 47 S. Ct., 202). There is no conflict here between the laws of the two states affecting the transmission of the trust property."

Thus the court did not overrule its determination in the *Wachovia Bank & Trust Company* case, but cited it without distinguishment. That authority must still be accepted as the law governing a determination of non-taxability under circumstances similar to those in the instant case. In [fol. 68] the face of the explicit ruling of the Court of Appeals in the *Sandford* case, which is thus far unchanged

by any contrary pronouncement of the Supreme Court, property passing under a power of appointment granted by a non-resident donor, and exercised by a resident donee, should not be subjected to double taxation. The appeal of the State Tax Commission is therefore denied.

Submit order on notice accordingly.

**IN SUPREME COURT OF NEW YORK**

**Appellate Division—First Department**

**In the Matter of the Appraisal Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased; STATE TAX COMMISSION, Appellant,**

**CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors, Respondents**

**STIPULATION WAIVING CERTIFICATION**

Pursuant to Section 170 of the Civil Practice Act It Is Hereby Stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which [fols. 69-70] the Court below acted in making said order appealed from and the whole thereof, now on file in the office of the Clerk of the Surrogate's Court of the County of New York; and certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated: New York, April 22, 1940.

J. M. Hirsch, Attorney for Appellant; Willard A. Mitchell, Attorney for Respondents.

[fol. 71] **IN SURROGATES' COURT, NEW YORK COUNTY**

**In the Matter of the Appraisal Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased; STATE TAX COMMISSION, Appellant,**

**CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors, Respondents**

**NOTICE OF APPEAL TO THE COURT OF APPEALS**

Please Take Notice that the State Tax Commission of the State of New York hereby appeals to the Court of Appeals from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of the Appel-



late Division of the Supreme Court, First Judicial Department, on January 24, 1941, which order unanimously affirmed the final order of the Surrogates' Court of the County of New York entered in the office of the Clerk of said Surrogates' Court on the 17th day of October, 1939, and a certified copy of which order of said Appellate Division was filed in the office of the Clerk of said Surrogates' Court on January 27, 1941, and from the order of said Surrogates' Court made and entered in the office of the Clerk of said Surrogates' Court on February 14, 1941, pursuant to said order of affirmance of said Appellate Division; and this appeal is from the whole and each and every part of said ~~order of affirmance of said Appellate Division~~ and from the [fol. 72] whole and each and every part of said order of the Surrogates' Court entered pursuant to said order of affirmance of said Appellate Division.

Dated: New York, N. Y., February 21, 1941.

Yours, etc., Jerome M. Hirsch, Attorney for State  
Tax Commission, Appellant, 80 Centre Street, New  
York, N. Y.

To: Willard A. Mitchell, Attorney for Executors, Respondents, 141 Broadway, New York, N. Y.; George T. Campbell, Esq., Clerk, Appellate Division, Supreme Court, First Judicial Department; George Loesch, Esq., Clerk, Surrogates' Court, New York County.

[fol. 73] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

Present: Hon. Francis Martin, Presiding Justice; Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased; STATE TAX COMMISSION, Appellant;

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors, Respondents

9753

Order of Affirmance on Appeal from Surrogate

ORDER APPEALED FROM—January 24, 1941

An appeal having been taken to this Court by the State Tax Commission of the State of New York, from an order



of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 17th day of October, 1939, affirming an order entered on December 1, 1938, fixing and assessing an estate tax in the estate of the decedent herein, and said appeal having been argued by Mr. Mortimer M. Kassell of counsel for the appellant, and by Mr. Thomas A. Ryan of counsel for the respondents, and a [fol. 74] brief having been filed by Mr. Heber Smith on behalf of Smith & Stanley and Merchant, Olen & Flagg, as *amici curiae*; and due deliberation having been had thereon,

It is hereby unanimously Ordered and Adjudged that the order so appealed from be and the same is hereby affirmed with costs.

Enter.

F. M.

#### IN SURROGATE'S COURT FOR NEW YORK COUNTY

Present: Hon. James A. Foley, Surrogate

In the Matter of the Appraisal Under the Estate Tax Law  
of the Estate of EUGENE V. R. THAYER, Deceased

ORDER ON REMITTITUR OF APPELLATE DIVISION—February 13,  
1941

An appeal having been taken to the Appellate Division of the Supreme Court, First Judicial Department, by notice of appeal, dated November 13, 1939, by the State Tax Commission from the order made and entered in the above-entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on October 17, 1939, which order affirmed an order theretofore made and [fol. 75] entered herein on December 1, 1938, fixing and assessing an Estate Tax in the Estate of the decedent herein, under Article 10-C of the Tax Law, and said State Tax Commission having appealed from each and every part of said order of October 17, 1939, and said appeal having duly come on to be heard before said Appellate Division of the Supreme Court, First Judicial Department, and said Court having unanimously affirmed the order so appealed from with costs, and a certified copy of said order having been filed in the office of the Clerk of this Court, together with the remittitur, on January 27, 1941.

Now, on reading and filing the annexed notice of settlement with due proof of service thereof upon the attorneys of record in this proceeding and the remittitur herein;

And, on motion of Willard A. Mitchell, attorney for the Executors, it is hereby:

Ordered, that the order of the Appellate Division of the Supreme Court, First Judicial Department, unanimously affirming the order of this Court made and entered herein on October 17, 1939 affirming the order of this Court made and entered on December 1, 1938 fixing and assessing the Estate Tax in the Estate of the decedent herein under Article 10-C of the Tax Law, ~~be and the same hereby is~~ made the order of this Court.

James A. Foley, Surrogate.

[fol. 76]

#### AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,

County of Albany, ss.:

Mortimer M. Kassell, being duly sworn, deposes and says:

I am an attorney at law and Deputy Commissioner and Counsel, State Tax Commission, appellant herein, and am familiar with the proceedings heretofore had herein. No opinion was filed by the Appellant Division in making its order of January 24, 1941, affirming the final order of the Surrogates' Court, New York County, entered on October 17, 1939, in the proceeding entitled "In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Eugene V. B. Thayer, Deceased."

Mortimer M. Kassell.

Sworn to before me this 25th day of February, 1941.

Mary C. Fitzpatrick, Notary Public, Albany County.

#### STIPULATION WAIVING CERTIFICATION

It Is Hereby Stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order of the Appellate Division appealed from, and the order of the Surrogates' Court entered on the remittitur of [fol. 77] the Appellate Division, all of which are now on file in the office of the Clerk of the Surrogates' Court of

the County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act is hereby waived.

Dated: New York, N. Y., March 3rd, 1941.

Jerome M. Hirsch, Attorney for State Tax Commission; Willard A. Mitchell, Attorney for Executors.

[Clerk's certificate to foregoing transcript omitted in printing.]

[fol. 78] IN COURT OF APPEALS OF NEW YORK

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of June, in the year of our Lord one thousand nine hundred and Forty-one, before the Judges of said court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding; John Ludden, Clerk

REMITTITUR—June 19th, 1941

[fol. 79] In the Matter of the Appraisal Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased.

Be it remembered, that on the 5th day of April in the year of our Lord one thousand nine hundred and forty-one, State Tax Commission of the State of New York, the appellant in this cause, came here unto the Court of Appeals, by Jerome M. Hirsch, its attorney, and filed in the said court a notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department and Carl J Schmidlapp and another as executors, the respondents in said cause, afterwards appeared in said Court of Appeals by Willard A. Mitchell, their attorney

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Mortimer M. Kassell, of counsel for the appellant and by Mr. Thomas A. Ryan, of counsel for the respondents brief filed by amici curiae and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

A question under the Federal Constitution was presented and necessarily passed upon. The appellant contended that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in this proceeding, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that the statute aforesaid, as sought to be applied in [fol. 80] this proceeding, is violative of, and repugnant to, the Fourteenth Amendment of The Constitution of the United States.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, there to be proceeded upon according to law. Therefore, it is considered that the said order be affirmed with costs, &c., as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates thereof, & c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, June 19, 1941.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal)

[fol. 81] IN SURROGATE'S COURT FOR NEW YORK COUNTY

Present: Hon. James A. Foley, Surrogate

P. 121-1937

In the Matter of The Appraisal under the Estate Tax Law of the Estate of EUGEN' V. R. THAYER, Deceased

ORDER ON REMITTITUR—July 10, 1941

An appeal having been taken in the Court of Appeals by the State Tax Commission from an order of the Appel-

late Division of the Supreme Court, First Judicial Department, entered in the Office of the Clerk of the said Court on January 24, 1941, unanimously affirming a final order of the Surrogate's Court of the County of New York, duly entered in the Office of the Clerk of said Surrogate's Court on October 17, 1939, a certified copy of which order of said Appellate Division was filed in the Office of the Clerk of said Surrogate's Court on January 27, 1941, and from the order of said Surrogate's Court made and entered in the Office of the Clerk of said Surrogate's Court on February 14, 1941, pursuant to said order of affirmance of said Appellate Division, and the State Tax Commission of the State of New York having appealed from the whole and each and every part of said order of affirmance of said Appellate Division, and from the whole and each and every [fol. 82] part of said order of the Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division, and said appeal having duly come on to be heard before the Court of Appeals of the State of New York and said Court having unanimously affirmed the order appealed from, with costs, by order duly made and filed in the Office of the Clerk of the Court of Appeals of the State of New York on June 19, 1941, and a certified copy of said order together with the remittitur from the Court of Appeals having been duly filed in the office of this Court and the costs of the Executors having been duly taxed,

Now, on reading and filing the remittitur herein,

And, on motion of Willard A. Mitchell, Esq., attorney for the Respondents-Executors, it is hereby

Ordered, that the said order of the Court of Appeals, unanimously affirming the said order of the Appellate Division, dated the 24th day of January, 1941, made the order of this Court by order made and entered herein on February 14, 1941, unanimously affirming the order of this Court made and entered herein on October 17, 1939, affirming the order of this Court made and entered on December 1, 1938 affixing and assessing the Estate Tax on the Estate of the decedent herein under Article 10-C of the Tax Law, be and the same hereby is made the order of this Court and it is

Further Ordered that the Respondents-Executors herein recover of the State Tax Commission of the State of New York the sum of \$167.68, being the costs and disbursements of said Respondents as determined herein.

James A. Foley, Surrogate.



Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed October 27, 1941

The petition herein for a writ of certiorari to the Surrogates Court of the County of New York, State of New York, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 45,932. New York, Surrogates Court of the County of New York. Term No. 604. Mark Graves, John P. Hennessey and Joseph M. Mesnig, as Commissioners Constituting the State Tax Commission of the State of New York, Petitioners, vs. Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors of the last Will and Testament of Eugene V. R. Thayer, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1941. Term No. 604, O. T., 1941.

(7949)

